MIAMI REVIEW — MIAMI, FLORIDA

in the

Supreme Court

of the

United States

OCTOBER TERM, 1975

No. 75-1414

DONNELLY ADVERTISING CORPORATION
OF FLORIDA and
EMPIRE INDUSTRIES CORPORATION,
Petitioners,

vs.

CITY OF MIAMI, ET AL, ETC.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ARGUMENT

PETITIONERS' REASONS FOR GRANTING THE WRIT

1. The Court below has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Petitioners complain that they have been denied oral argument or a written opinion under and by application of rules adopted by the United States Court of Appeals, Fifth Circuit (hereinafter the "Fifth Circuit").

Petitioners do not cite any case dealing with appellate court denial of oral argument or a written opinion.

The *Rinaldi v. Yeager*, 384 U.S. 305, case involved a requirement that a prisoner pay for a transcript of proceedings (in the case in which he was convicted) from his prison earnings. This was held discriminatory and invalid since persons convicted and receiving a suspended sentence or probation did not have to pay for their transcripts.

The *North Carolina v. Pearce*, 395 U.S. 711, case involved the imposition of greater sentences after a second trial when the initial conviction was reversed on appeal.

The case of *Mayer v. Chicago*, 404 U.S. 189, involved the Illinois rule of providing indigents free transcripts on appeal in *felony* cases *only*. Mayer, an indigent, was convicted of a non-felony and was denied an appellate transcript. It was held that transcripts must be provided to non-felony indigents as well as felony indigents.

Petitioners have not demonstrated that the denial of oral argument or a written opinion is so far a departure (if it is any departure at all) from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. The Court below has rendered a decision in conflict with the decision of other Courts of Appeals on the same matter.

Under this point, petitioners complain that the U.S. District Court relied upon the opinion and record in State of Florida cases involving the same parties and subject matter as involved in the instant case and that the Fifth Circuit erroneously approved this procedure.

Petitioners claim that, in doing so, the Fifth Circuit is in conflict with three decisions of other courts of appeals on the same matter.

In two of the three decisions cited, *Adams v. Campbell County School District*, 10th Cir. 1973, 483 F.2d 1351, and *Dale v. Hahn*, 2d Cir. 1971, 440 F.2d 663, factual *affidavits* were on file and utilized by the court in granting defendants' motions to dismiss.

In the third case, *Huszar v. Cincinnati Chemical Works, Inc.*, 6th Cir. 1949, 172 F.2d. 6, Huszar's claim that an affirmative defense (prior public use—in a patent case) must be pleaded and proved was obviated by Huszar's pleading of prior public use in his counterclaim.

The case of *Paul v. Dade County, Florida*, 5th Cir. 1969, 419 F.2d 10, demonstrates the *lack* of conflict, peti-

tioners assert. In *Paul*, it was held that where the same question was previously litigated in the courts of the State of Florida which denied relief, the U.S. District Court lacked jurisdiction to re-litigate the same constitutional claims. The court said at p. 12:

> "Paul v. Dade County, Fla.Ct.App. 1967, 202 So.2d 833, cert. denied, Fla., 207 So.2d 690, cert. denied, 390 U.S. 1041, 88 S.Ct. 1636, 20 L.Ed.2d 304 is the prior state case and, while it was not made part of the record on this appeal, we may, of course, take judicial notice of it, *see* New York Indians v. United States, 1898, 170 U.S. 1, 32, 18 S.Ct. 531, 42 L.Ed. 927; Lambert v. Conrad, 9 Cir. 1962, 308 F.2d 571; Saint Paul Fire & Marine Insurance Company v. Cunningham, 9 Cir. 1958, 257 F.2d 731; Ayers v. Hartford Accident & Indemnity Company, 5 Cir. 1939, 106 F.2d 958; and of the pleadings therein, Zahn v. Trans-america Corporation, 3 Cir. 1947, 162 F.2d 36, 48 (n. 20), 172 A.L.R. 495."

Petitioners argue that cases involving *factual affidavits* and a case involving an affirmative defense which was neutralized by allegations contained in a counterclaim are in conflict with the instant Fifth Circuit judgment.

Again, petitioners have not demonstrated that the decision of the Fifth Circuit is in conflict with the decision of another court of appeal *on the same matter*.

Lastly, petitioners assert that the Fifth Circuit "has ruled that a litigant is collaterally estopped from litigat-

ing in a Federal Court those issues which were not raised in a prior State criminal case, but which could have been litigated."

Here, petitioners' basic premise is erroneous. Petitioners state that a case in the Miami Municipal Court is a criminal case. A violation of a municipal ordinance, such as is involved here, is not a *crime*. *Boyd v. County of Dade*, Fla. 1960, 123 So.2d 323. Petitioners reference to *criminal case* holdings in order to show a conflict with decisions of other courts of appeal is, therefore, simply misplaced.

CONCLUSION

The petition for a writ of certiorari should be denied.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to Robert D. Korner, Esq., Korner, Sampson & Partridge, attorneys for petitioner, 4790 Tamiami Trail, Coral Gables, Florida 33134, this 20th day of May, 1976.

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